IN THE

Supreme Court of the United States

FOR THE THIRD CIRCUIT

DOCKET NO.

78-842

TOM'S FORD, INCORPORATED,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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TABLE OF CONTENTS

CASES CITED:

TABLE OF CONTENTS

APPENDIX

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TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Tom's Ford, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit granting in part and denying in part enforcement of an order of the National Labor Relations Board.

OPINIONS BELOW

The opinions below and their appendix designation are as follows:

National Labor Relations Board Decision, 233 *NLRB* No. 2 (Appendix A; Pa1-Pa4); Administrative Law Judge Decision (Appendix B; Pa5-Pa29);

United States Court of Appeals for the Third Circuit Opinion (Appendix C; Pa30-Pa32); United States Court of Appeals for the Third Circuit Judgment (Appendix D; Pa 33-Pa36); United States Court of Appeals for the Third Circuit Stay of Mandate (Appendix E; Pa37).

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit (Docket No. 77-2398) was entered on October 5, 1978. The jurisdiction of this Court is invoked under 28 *U.S.C.* §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether Federal Evidence Rule 615, Fed. Rules Evid. Rule 615, 28 *U.S.C.*, makes sequestration of witnesses a matter of right in an Unfair Labor Practice proceeding before the National Labor Relations Board conducted pursuant to §10(b) of the National Labor Relations Act, as amended, 29 *U.S.C.* §160(b).

2. Whether the NLRB's refusal to sequester witnesses as a right under Rule 615 was a prejudicial denial of petitioner's due process right to cross-examination of the Board's case where the three witnesses who were not sequestered comprised the Board case-in-chief and where effective cross-examination and truth-finding of these three witnesses was precluded by reason of the denial of sequestration.

STATUTES INVOLVED

The statute involved in this case and the rule of evidence are set forth below as follows:

1. FEDERAL EVIDENCE RULE 615, Fed. Rules Evid. Rule 615, 28 *U.S.C.*, 88 Stat. 1937:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

2. NATIONAL LABOR RELATIONS ACT, §10(b), 29 *U.S.C.* §160(b):

> (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the mem-

ber, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

STATEMENT OF THE CASE

This case arises out of an Unfair Practice Charge filed on July 28, 1976, by Amalgamated Local Union No. 355 against Tom's Ford, Inc., alleging a discriminatory discharge contrary to §8(a)(1) and (3) of the National Labor Relations Act, as amended, of three employees by reason of their activities on behalf of Local 355 (Pa26).* On that same day Local 355 made a demand for recognition and, on refusal, also filed a Petition for Certification of Representative (Pa32).

On September 30, 1976, a Complaint and Notice of Hearing was issued on the Unfair Practice Charge charging discriminatory discharges and unlawful interrogation (Pa27 to 30), and the matter went to hearing before an Administrative Law Judge. (It was heard along with a Representation case consolidated with the unfair practice case, but not pertinent here.) At the outset of the hearing, Counsel for the employer, Tom's Ford, Inc., made a motion for sequestration of the discriminatees because of a belief that credibility would be an important issue in the proceeding (Pa 63). This was denied without comment (Pa63-23; Pa64-17).

* Pa references in this section are to the joint appendix which is part of the record before the Third Circuit below.

The first of only five witnesses presented by General Counsel was the Business Agent of Amalgamated Local Union No. 355, the charging party, who testified to union contact having been made by Steve Elyar, one of the alleged discriminatees, a subsequent union meeting with a number of the workers of Tom's Ford, and the use of Elyar as liaison to the union (Pa18 to 19). On the unlawful interrogation issue, John Krumbine, testified merely to Elyar's request that he attend a union meeting and to a casual conversation with the company's service manager during which he was asked if there was any union, responding that there are talks of a union (Pa107). However, this question was found by the Third Circuit not to be a violation of §8(a)(1) of the Act, unlawful interrogation, and enforcement of that portion of the Board's order was denied. See Appendix C at 31a.

The remainder of the Board's case, constituting its case-in-chief against Tom's Ford for discriminatory discharges, came only from the testimony of the three alleged discriminatees themselves. They testified as to initial union contact, concerted activity at a union meeting with other employees, joint organizing efforts on and off company premises, and as to what was said by the employer at the time of their discharge. Their testimony was central to the charge of discriminatory discharges, the other two witnesses being peripheral or on the interrogation charge which was not enforced.

A decision was issued on June 20, 1977, finding that the three discriminatees had been unlawfully discharged and that one employee had been unlawfully interrogated. Appendix B. The National Labor Relations Board issued its Decision and Order on October 18, 1977, affirming the findings below. Appendix A.

Petition for review was filed before the United States Court of Appeals for the Third Circuit on November 3, 1977, under the grant of jurisdiction of 29 *U.S.C.* §160(f). The Board cross-appealed on December 12, 1977.

On August 18, 1978, the Third Circuit filed its opinion in the case, refusing to enforce the Board's order on unlawful interrogation, and affirming the Board's action on the unlawful discharges. The court found substantial evidence in the record to support the Board's decision, discarding petitioner's question of sequestration being error on the ground that no prejudice was found and because it found "no indication that the ALJ relied upon their [the three discriminatees] testimony to resolve material issues of fact in the proceeding." Appendix C at 32a.

Thereafter, on October 5, 1978, the court entered an Order in conformity with its opinion. Appendix D. Petitioner Tom's Ford moved for and was granted a stay of formal mandate on November 1, 1978, until November 25, 1978, pursuant to Rule 41(b), FRAP. Appendix E.

This petition for a Writ of Certiorari is being submitted within the period of the stay of mandate to contest the denial of sequestration of witnesses who comprised the case-in-chief against petitioner for unlawful discharges as being contrary to statutory proceedings for unfair practice hearings and as a prejudicial denial of due process.

REASONS FOR ALLOWANCE OF THE WRIT

Introduction

Certiorari should be granted to settle the very important question of the applicability of Rule 615 to National Labor Relations Board proceedings in unfair labor practice cases in light of the confusion and hesitancy of a number of other Circuits in addressing "the Rule" as it is now codified as a matter of right. The Board does not recognize the statutory requirement.

In addition, certiorari should be granted to examine the ancient traditions of sequestration as "one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice," 6 Wigmore, *Evidence* §1838, p. 463 (Chadbourn ed. 1976) and its fundamental role in any hearing wherein the right to cross-examine is preserved. For without sequestration, cross-examination becomes hollow and the entire proceeding loses both its integrity and fundamental fairness.

Point I

It was error not to enforce the right to sequestration created by *Rule* 615 and made applicable to NLRB Unfair Practice Proceedings through §10(b) of the Act.

Tom's Ford was denied its statutory right to exclusion of witnesses under Rule 615, Fed. Rules Evid., 28 *U.S.C.*, as made applicable to unfair practice proceedings pursuant to §10(b) of the National Labor Relations Act, as amended, 29 *U.S.C.* §160(b). Because the three witnesses sought to be sequestered were the only three witnesses presented by the NLRB in the prosecution of its discriminatory discharge

case-in-chief, the refusal to sequester them precluded effective cross-examination of that entire case.

The effect of the denial of sequestration was as if the Administrative Law Judge had declared at the outset of the hearing that the Board was to be permitted to present its case against Tom's Ford on the discharges without being subject to cross-examination. That was the irrefutable result of the denial here where the Board case was presented through three alleged discriminatees who had the benefit of each other's testimony and who could not be tested as to the truthfulness of their testimony either in part or on the whole.

Federal evidence Rule 615 provides in pertinent part:

> At the request of a party the Court *shall* order witnesses excluded so that they cannot hear the testimony of other witnesses, ...

(Emphasis added.) It was intended to make sequestration a matter of right, see *id.*, Notes of Advisory Committee on proposed rules, Rule 615, 28 *U.S.C.A.* at p. 446 (1975), and has been so interpreted. *L.S. Ayres & Co. v. NLRB*, 551 F.2d 586, 588 (4th Cir. 1977) ("Matter of right"); *NLRB v. Stark*, 525 F.2d 422, 429 (2d Cir. 1975), *cert. denied*, 424 *U.S.* 967 (1976) (Rule 615 as having "adopted Wigmore's principle of mandatory exclusion"); *NLRB v. Pope Maintenance Corp.*, 573 F.2d 898, 907 (5th Cir. 1978) ("New rule 615 makes sequestration a matter of right"). Undecided, however, is the question of whether the full force of the Rule applies to Board proceedings, *e.g.*, *Pope Maintenance Corp.*, *supra.*, though the Board in a recent *sua sponte* reconsideration of decision in *Unga Painting Corp. and International Brotherhood of Painters*, 237 *NLRB* No. 212, 1978 *CCH NLRB*

¶19,592 (August 31, 1978), stated the policy that

> alleged discriminatees should be excluded only during that portion of the hearing when another of the General Counsel's or charging party's witnesses is testifying about events to which the discriminatees have testified, or will or may testify, either in the case-in-chief or on rebuttal.

Id., at p. 32,629. Nonetheless, this announced Board policy on sequestration falls short of a recognition of the statutory "right" created by Rule 615; it would only minimally "effectuate the spirit of Rule 615," *id.*, without acknowledging the clear statutory language compelling the full force of the Rule on Board proceedings.

Unfair labor practice proceedings before the NLRB are governed insofar as is pertinent here by §10(b) of the Act. That statute requires that "[a]ny such proceeding shall, so far as practicable, be conducted in accordance with the Rules of Evidence applicable in the District Courts of the United States. . . ." 29 *U.S.C.* §160(b). This statute would require the Board to follow the Federal Rules of Evidence as now codified in Title 28, these being the Rules prevailing in Federal Courts at this time. See *NLRB v. Capitol Fish Co.*, 294 F.2d 868, 875 (5th Cir. 1961). The only deviation which can be permitted is pursuant to the phrase "so far as practicable." This phrase admits a certain leeway in applying the Federal Rules of Evidence, but only "to the extent that this is necessary because of the peculiar characteristics of administrative hearings." *General Engineering, Inc. v. NLRB*, 341 F.2d 367, 374 (9th Cir. 1965); see *Capitol Fish, supra*, 294 F.2d at 875.

The first question before this Court is whether the right to sequestration created by Rule 615 is enforceable in an

unfair practice proceeding before the Board through §10(b) or whether there are such "special characteristics" of a Board proceeding as would justify a denial of the right created. It is submitted that unfair practice proceedings are not demonstrably so unique as to justify a denial of the right of sequestration in derogation of Rule 615.

Point II

It was error to find that the denial of sequestration was not prejudicial where the three witnesses who were not sequestered comprised the case-in-chief against the employer.

It is submitted that it is a prejudicial denial of due process to conduct an evidentary, adjudicatory hearing before a federal agency wherein the responding party may not cross-examine or otherwise test and impeach the credibility of the entire case presented against it. If effective cross-examination is not permitted on the full case against a respondent, then respondent has no opportunity to expose inconsistencies on facts in contention or to expose inconsistencies which would discredit the entire testimony of the witnesses and, accordingly, the whole case against respondent. Without cross-examination, a hearing becomes a decidedly one-way street with neither the adherence to statutory right, nor the achievement of fundamental fairness, nor even the appearance of procedural integrity.

Thus, the second question before the Court is whether it was a prejudicial denial of due process to have refused to sequester the three alleged discriminitees who together comprised the case-in-chief against an employer.

Placing a witness under "the Rule" has been called "a simple and time-tested method for helping to discover

the truth." *NLRB v. Stark, supra*, 525 F.2d at 427. Wigmore states that "[t]here is perhaps no testimonial expedient which, with as long a history, has persisted in this manner without essential change." 6 Wigmore, *Evidence*, §1837, p. 457 (Chadbourn ed. 1976). It is as old as the Bible itself. The process of sequestration uniquely provides what in some cases is the only means by which the probative value of a witness's testimony may be tested—not only on cross-examination, as is here the case, but also on direct examination.

Though sequestration and cross-examination are somewhat separate concepts, they both rank high in ferreting out the truth from witnesses. And if sequestration is denied, effective cross-examination is consequently denied as being no longer practicably available; for whatever is asked of one witness is learned by the others.

For example, in this proceeding, the employer has consistently maintained it had no knowledge of union activities; thus, evidence of these activities may come only from those claiming to have undertaken them. Since the scope of activity is a circumstance upon which a finding of knowledge may be based, it is important that the employer be able to test the truthfulness of the stated activities, a test which may be undertaken on cross-examination only if the witnesses do not have the benefit of each others' testimony.

The three non-sequestered witnesses testified to concerted activity during a union meeting which, if true, would have identified them as the prime movers of the union to other employees. They testified to joint organizing efforts both on and off the company premises; and all three were likewise together at the time of discharge, each repeating the same testimony as to what the employer said at that time. Without sequestration the employer had no means

to test their testimony. They listened to each other, they learned and they repeated. As a result, Tom's Ford was deprived of the opportunity to show that they did not jointly present themselves as the union organizers, that they did not conduct the scope of organizing activities as might ever come to an employer's attention, and that on discharge no anti-union remarks were made. Since these elements were necessary to the Board's case, prejudice would have to have been found on the denial of sequestration.

The Third Circuit went on to find that the ALJ did not rely on the testimony of the three discriminatees, the Board case-in-chief, to resolve material issues of fact. And although this is consistent with the NLRB's concession before the court that there was no credited direct evidence of knowledge of union activity (NLRB b12), this case being shadowy at best, nevertheless, it misses the other critical purpose of sequestration—the opportunity to discredit an entire witnesses' testimony and, here, the entire Board case.

Beyond the enabling of effective cross-examination of individual witnesses on material facts, sequestration permits the discovery of inconsistencies to show disharmony on commonly observable circumstances by the three witnesses so as to discredit their whole testimony (*Falsus in uno, falsus in omnibus.*). Since the three comprised the Board case-in-chief, a discrediting of them would have had the undeniable effect of discrediting the entire Board case. As Wigmore stated, disharmony "not only discredits one or both of the witnesses in all their testimony, but also throws suspicion on the entire mass of evidence of that party. . . ." 6 Wigmore, *Evidence, supra,* §1838 at p. 463.

Sequestration in this case would have afforded Tom's Ford the opportunity which was its by statutory right to

show that the three witnesses' stories were generally inconsistent, discrediting them individually, and discrediting what was the entire Board case on the discriminatory discharges. This case did not involve separate incidents for the witnesses; rather, it arose out of a joint course of alleged conduct by the three witnesses. Sequestration was therefore especially important.

It is submitted that Tom's Ford was placed in a position of prejudice on the loss of its due process right to cross-examine the case in opposition. Though it would claim prejudice on material fact resolutions, even absent these there was a lost opportunity to discredit all three witnesses and thus the whole Board case.

The denial of sequestration was a breach of statutory right. It resulted in a hearing with no effective cross-examination and no time tested tool for arriving at the truth, both due process rights, though here linked. The conduct of the hearing was fundamentally unfair in light of the admitted lack of direct evidence of knowledge—making credibility of the utmost importance—and because of the unity of activity by the witnesses and lack of cooperation by other witnesses. The three were the case. Without sequestration, the case was heard without cross-examination; this was prejudice, clearly. Moreover, even the appearance of fairness was absent.

It is respectfully submitted that this Court should restore sequestration to its rightful place as a timeless device for testing the truth as much as cross-examination. As a hearing which denies a respondent the opportunity to cross-examine would doubtless be prejudicial, so, too, must the denial of sequestration be prejudice where it so intimately affects the whole case.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

MEAGHER & HREBEK
Attorneys for petitioner

By: /s/ Robert J. Hrebek
ROBERT J. HREBEK

APPENDIX A

DECISION AND ORDER

On June 20, 1977, Administrative Law Judge Phil W. Saunders issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions [1] and a supporting brief, and the General Counsel filed a statement of position concerning Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge, to modify his remedy so that interest is computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB No. 117 (1977),[3] and to adopt his recommended Order, as modified herein.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Admin-

1. The Respondent has requested oral argument. This request is denied as the record and exceptions adequately present the issues and the positions of the parties.

2. In light of our finding that Gordon Scala is not a supervisor and that Steven Elyar, Victor Webb, and Richard Webber are eligible voters, the Acting Regional Director is ordered to open and count these four challenged ballots in Case 22—RC—6840 and to issue the appropriate certification.

3. See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

4. Although the Administrative Law Judge made a finding of unlawful discharge, he inadvertently omitted from his recommended Order the paragraph stating that the Respondent shall cease and desist from such conduct. We shall modify his recommended Order accordingly.

istrative Law Judge as modified below and hereby orders that the Respondent, Tom's Ford, Incorporated, Keyport, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 1(a) and reletter the subsequent paragraphs accordingly:

"(a) Laying off, discharging, or discriminating against employees for joining or supporting Amalgamated Local Union No. 355, or any other labor organization."

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. October 18, 1977

Howard Jenkins, Jr., Member

John A. Penello, Member

Betty Southard Murphy, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Act, as amended, gives all employees these rights:

To engage in self-organization

To form, join, or help a union

To bargain collectively through a representative of your own choosing

To act together for collective bargaining or other mutual aid or protection

To refrain from any or all of these things.

WE WILL NOT lay off, discharge, or discriminate against employees for joining or supporting Amalgamated Local Union No. 355, or any other labor organization.

WE WILL NOT interrogate employees concerning their knowledge of the Union and its organizational activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL offer full reinstatement to Steven Elyar, Victor Webb, and Richard Webber and give them back-

pay with interest for their loss of earnings and restore their seniority and the privileges attaching to it.

TOM'S FORD, INCORPORATED

(Employer)

Dated _____

By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, 16th Floor, 970 Broad Street, Newark, New Jersey 07102, Telephone 201-645-3652.

APPENDIX B

DECISION

Statement of the Case

PHIL W. SAUNDERS, Administrative Judge: Based on a charge filed on July 28, 1976, by Amalgamated Local Union No. 355, herein Local 355 or the Union, a complaint was issued on September 30, 1976, against Tom's Ford Incorporated, herein Respondent or the Company, alleging violations of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, as amended. Respondent filed an answer to the complaint denying it had engaged in the alleged matter. Both the Respondent and General Counsel filed briefs.

Upon the entire record in this case, and from my observation of the witnesses and their demeanor,[1] I make the following:

Findings of Fact

I. The Business of the Company

At all times material herein the Respondent, a New Jersey corporation, has maintained its principal office and place of business at 200 Route 35, Keyport, New Jersey, and has been continuously engaged at this location in the retail sale and servicing of new and used automobiles.

1. The facts found herein are based on the record as a whole upon my observation of the witnesses. The credibility resolutions herein have been derived from a review of the *entire testimonial record and exhibits* with due regard for the logic of probability, the *demeanor* of the witnesses, and the teaching of *N.L.R.B. v. Walton Manufacturing Company*, 369 U.S. 404. As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. *All testimony* has been reviewed and weighed in the light of the *entire record.*

Respondent's garage in Keyport is the only facility involved in this proceeding.

In the course and conduct of Respondent's business operations during the previously 12 months, Respondent derived gross revenues in excess of $500,000 from the sale and servicing of new and used automobiles, and during this period the Respondent purchased and caused to be shipped to its Keyport facility automobiles valued in excess of $50,000, and which automobiles were shipped to said location directly from States of the United States other than the State of New Jersey.

The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

Local 355 is a labor organization within the meaning of Section 2(5) of the Act.[2]

III. The Alleged Unfair Labor Practice

The main issue in this case is whether the Respondent unlawfully discharged Steven Elyar, Victor Webb, and Richard Webber, on July 27, 1976, because they engaged in protected Union and other concerted activity, and whether Respondent, by its Service Manager John Stillings, unlawfully interrogated employees in violation of Section 8(a)(3) of the Act.[3]

2. The Motion by the General Counsel to introduce by stipulation his Exhibits 7(a) through 1, and 8(a) through (k), is hereby granted.

3. The transcript in this proceeding is hereby corrected in accordance with the respective Motions from both the General Counsel and the Respondent, dated May 4 and May 9, 1977. Subsequent to the above dates, the Respondent also filed additional Motions on May 18, 1977, for a New or Reopening of the Hearing, and a Motion to File Reply Brief, on the basis that the errors and omissions in the transcript of this hearing were so significant that the instant record cannot stand in its present form. However, it appears to me that with the initial Motions from the parties, as indicated above, along with a letter from Capitol Hill Reporting, Inc., also rectifying certain portions of the transcript, and in consideration of all, this record is now sufficiently corrected to substantially and adequately reflect these proceedings. In accordance therewith, I hereby deny the Motions filed by the Respondent on May 18, 1977.

In May, 1976,[4] the employees of Respondent were unrepresented for the purposes of collective bargaining. Respondent employed approximately 25 employees in the service and parts portion of its business. Webb and Webber were employed as line mechanics and Elyar as a new and used get-ready mechanic, until July 27, when all three were discharged at the same time.[5]

In the spring of 1976, several of Respondent's employees, including Elyar, Webb, and Webber, began to informally discuss the possibility of seeking union representation, and Elyar then contacted an acquaintance of his, and in so doing acquired the name of the Union. On or about July 19, Elyar called the Union to inquire about seeking representation for Respondent's employees, and within a few days, Lester Horowitz, a business agent of Local 355, returned Elyar's telephone inquiry and the two men then discussed the possibility of a union. In the course of their conversation it was decided that a meeting would be arranged between the Union and Respondent's employees and the meeting was set for July 26, but during the ensuing days between the telephone discussion and July 26, Elyar and Webb (Webber was on vacation) began

4. All dates are 1976 unless stated otherwise.

5. On August 13, a Consent Election was approved and a secret election was then conducted by the Board on September 15 among the Respondent's service department employees. On October 15 the Regional Director issued his Report on Challenged Ballots. On December 10 the Board issued an Order Directing Hearing in Case 22-RC-6840. On December 28, the Regional Director issued an Order Consolidating Cases 22-CA-7103 and 22-RC-6840 for hearing. As concerns Case 22-RC-6840, the only issue heard before me involved the supervisory status of Gordon Scala.

speaking with other unit employees about the Union, and encouraging them to attend the scheduled meeting. In all, the two men spoke to most of their co-workers in and around the Respondent's location while at lunch or while on coffee break.

This record also reveals that in the spring of 1976 the Respondent's Service Manager John Stillings had requested that six mechanics, including Elyar, Webb, and Webber, take certain mechanic skill tests offered by the National Institute for Automatic Excellence. This institute is a nonprofit corporation which conducts competency tests in automotive mechanics and related areas. The Respondent paid for the costs of the tests, but they were taken by these employees on their own time. It appears that a mechanic participating in this program may take any number of tests as one is offered for each basic area of automotive repairs, and anyone who successfully passes one or more tests are then issued a "certification card." Of Respondent's six employees who took the skill tests, four of them passed in at least one area. Webb and Webber passed all of their tests and Elyar passed four out of five, but mechanic Charles Nasso passed only one test. Each of these individuals then received their certification cards. Stillings admitted that these certificates were not a condition of employment with Respondent, nor are they relied upon by Respondent in evaluating employees and have nothing whatsoever to do with an employee's work performance. Stillings even recalled specifically reassuring mechanic Cherles Nasso, distraught over having passed only one test, that he did not consider the tests as any criteria. However, irregardless of this, Elyar, Webb, and Webber felt that they were entitled to some monetary consideration for being certified, and particularly where, as here, Respondent envisioned posting their certificates

in the office so as to advertise the skill of their mechanics to the general public and to its customers. With this in mind, Webb, Elyar, Webber, on July 26, approached John Crombine, a mechanic who had been with Respondent for quite some time, and asked Crombine to speak with Stillings on their behalf as to the possibility of being compensated for passing the tests. Crombine agreed to do so, and late in the day on July 26, he spoke with Stillings on this matter, but Stillings indicated to Crombine that the final say as to any compensation or bonus for these tests was not his decision to make. In this conversation Stillings also asked Crombine "if there was any Union?" and Crombine then replied "there are talks of a union," and also testified that the subject matter of a union was initially raised by Stillings.[6]

On the evening of July 26, Elyar, Webb, and Webber went to the scheduled Union meeting where they encountered approximately 11 other unit employees of Respondent and also representatives of Local 355, including Lester Horowitz. At this meeting, Horowitz discussed the benefits of union representation and then showed them examples of union contracts in other organized shops. After these discussions the Union representatives left the room to permit the employees to talk about the matter among themselves, and at this time Webb openly identified Elyar, Webber, and himself, as being the employees who had contacted the Union. When the Union agents returned to the meeting they then distributed union authorization cards to the employees, and all 14 employees in attendance signed cards and returned them to Horowitz. It was also

6. Stillings admitted that after hearing Crombine explain the views of Webb, Webber and Elyar on their request for possible compensation, he then asked Crombine, "Was there anything else bugging these guys, is there any union stuff going on?"

decided that Elyar would be the liaison between the Union and the employees, and Elvar was given authorization cards to distribute to those employees who did not attend this meeting.

On the morning of July 27 Elyar handed out authorization cards in the shop to employees who had not attended the Union meeting the evening before, and including John Crombine. It appears that Webber also spoke with employee Robert Smith about the Union meeting,[7] and during the morning a copy of a Local 355 contract with another shop was given to Crombine, and Webber recalled that Crombine took the contract, walked away for about 10 minutes, and then returned it to him.

On July 27 a regular monthly service meeting was also scheduled by the Respondent for 5:30 p.m., and all service employees attended this shop meeting.[8] In the initial stages of this meeting, Stillings discussed various topics concerning the shop including the desire of Respondent to acquire the certification cards from those mechanics who had passed the skill tests a few weeks prior, as aforestated. Stillings acknowledged that Elyar, Webb, and Webber had informed him of their success on the tests, but otherwise admitted that he did not speak to any of them about their certification cards prior to the shop meeting. However, at this service or shop meeting Stillings supposedly spoke to all six employees who had taken the tests, and asked them to turn in their certificates for display. Stillings recalls the response to his request as being

7. Service Manager Stillings admitted that he had the type of relationship with employee Smith by which Smith would come to him and tell him about a union or about a union meeting.

8. Between 5 p.m., the normal quitting time, and the service meeting, Webber and Webb brought the automobile of Webber's girlfriend into the shop, put it on a lift, and removed the transmission. It appears that Webber had received permission from Stillings on the previous day to work on the car using Respondent's facilities.

total silence from everybody, but said that Webb finally spoke up and stated that he felt those employees who has passed the tests should receive some sort of monetary compensation or bonuses before turning in their certificates.[9]

Later on during the service meeting the employees were shown a film, but at the end of the film Manager Stillings asked Elyar, Webb, and Webber to wait for him in the office. A few minutes later Stillings walked into the office, went to his desk, and emerged with checks in his hand, and then told the three employees involved herein that they were being discharged. They testified that on this occasion Stillings told them that he could see they were unhappy with their jobs, that he knew they were the three instigators of the Union, that the shop was too small to be a union shop,[10] and that it would not be a union shop.[11]

9. Stillings testified that he was speaking generally to all six employees who had taken the tests. Thereafter, however, Stillings testified as follows: "Well, after I asked for the licenses three times, the three fellows, Elyar, Webber, and Webb gave me no response whatsoever." Elyar, Webb, and Webber recall that Stillings asked them specifically if they would turn in their certification cards, and also agreed that Webb voiced their feelings that they were entitled to some compensation for passing the tests and further that Stillings then stated that he wanted the carbs submitted the following day, and that they ultimately made some indications to do so.

10. Following the discharges, but preceding the Union election, Respondent distribution notices to employees stating its position and included the following observation: "We do not need a union in our small shop." See General Counsel's Exhibit No. 5.

11. Stillings testified that prior to the service meeting he had ordered final checks prepared for Webb, Elyar, and Webber because he anticipated a negative response from them on the matter of turning in their certificates. As pointed out, he also had reached this conclusion before ever specifically telling these employees to turn in their certificates as admittedly he had not asked them to do so until he mentioned the matter at the service meeting. Stillings also testified that on the occasion for the discharges here in question, he spoke to each of the three individually. Stated he informed Webb that his lack of cooperation was terrible, that he was causing problems by comparing his salary to other workers, and then expressed his dissatisfaction with the fact that Webb only performed brake and front-end jobs. He said that he then told Elyar that it had been brought to his attention that Elyar had a lot of "come back," and also admonished him for allegedly boasting about getting a job elsewhere; and informed Webber that he had been careless and having problems over the last few months, and that he, Stillings, had been giving Webber more raises than anybody.

The Respondent argues and contends that the first knowledge they had concerning the Union, was when Business Agent Horowitz appeared on the premises on July 28 protesting the discharge of three employees involved herein. The Respondent maintains that the three alleged discriminatees were fired over a controversy between the Service Manager concerning management's right to display mechanics' certification cards which had been obtained at the expense of the Company; that as a result of this dispute concerning the certification cards, the three here involved became wholly uncooperative and caused the service manager to finalize a previously tentative decision to fire them. The Respondent further contends that Elyar had "a lot of come back work" in connection with his repair jobs, that Webber, along with other reasons, was involved in several shop accidents which resulted in considerable property damage, and that Webb could only do a limited amount of brake and front-end work. The Respondent also points out to their poor attitudes, and maintains that on occasions they had "boasted" about leaving the Company.

Victor Webb began working for Respondent as a "line mechanic" in October, 1975. His starting base pay was $160 per week while his base pay on July 27, the date of discharge, was $180 per week and Stillings admitted that the wage increase was due to Webb's productivity.[12] Stillings classified Webb as a "very good mechanic" on front-end and brake work. Webb testified that his work performance was never criticized, but, to the contrary, was complimented by Stillings. It does appear that Webb was never disciplined for any reason in the course of his employment with Respondent.

12. In addition to the base salary, line mechanics also received weekly bonuses under a system by Respondent, and Webb frequently received such bonuses.

Stillings testified that one of the reasons Webb was discharged was because he did not turn in his certification card, and because of his inability to do other than brake and front-end work, and also causing problems by continually discussing his desire to receive wage increases.

As pointed out, Stillings conceded that he never specifically asked Webb (or anyone else) for his certification card prior to the service meeting on July 27. It is also undisputed that Webb was hired as a brake and front-end mechanic, and Webb testified that while he was learning other procedures from employee Crombine, Stillings had never suggested to him that his work ability was limited. Moreover, Stillings rarely assigned Webb any work other than brake and front-end jobs, but on occasions when he did assign Webb other small jobs, he found Webb's performance to be "fair." Further it would also appear that Webb's successful test results and certificates show that he could perform other work, and such is revealed by the testimony of Stillings on cross-examination:

Q. Do these cards have anything to do with the type of work they can perform?

A. To some extent yes.

Q. But not in Nasso's case?

A. No.

Q. But in Webb's case?

A. Most definitely.

As to complaints by Webb as to his salary and expressing his desires for increases—this record is clear that Webb, like Elyar and Webber, felt that those mechanics who successfully passed the certification or skill tests should receive some compensation, and, in accordance therewith,

they asked employee Crombine to intercede on their behalf and then Webb further enunciated their views on this subject at the service meeting on July 27. The record is devoid of any other problem in this regard.

Steven Elyar began his employment with Respondent in July, 1975, working as a mechanic preparing new and used cars for delivery and performing minor repairs. His starting pay was $130 per week while his pay on July 27 was $145 per week. His wage increase comprised of two raises, and the most recent coming a few months prior to his discharge. In the course of his employment Elyar had never received any disciplinary warnings for any reason, nor had his work performance been criticized. Moreover, it appears that on or about April or May, Elyar had spoken to Stillings about the possibility of his becoming a line mechanic when Respondent added new "lifts" to its operation, and Stillings indicated at that time he was "thinking about it." Elyar and Stillings had a similar decision later on when he again raised the subject with Stillings on or about the Friday before his discharge (July 23), and was then told by Stillings that it was his intention to promote Elyar to line mechanic.[13]

Stillings contends that the specific reasons for his decision to terminate Elyar was his refusal to turn in his certification card, his comeback work, and his boasting about leaving Respondent for other employment. As to the first reason, it is clear from prior discussion herein, such refusal to turn in his certification never took place. Relative to

13. Stillings confirms that he discussed this promotion with Elyar and telling him the Company was installing some new lifts, but he would have to ask the front office about it. Thereafter, on or about July 23, according to Stillings, he went to the office and informed the owner that he was thinking of moving Elyar into the line mechanic position, but was then told that Elyar had "a lot of come back work."

the second reason, the Respondent introduced several internal repair orders which were alleged to be "comeback" of work initially performed by Elyar, and on jobs which had been performed by Elyar during the 3-summer months of 1976 and the orders Stillings had relied upon in deciding to terminate Elyar pursuant to his conversation with the front office on July 23.[14]

Stillings gave a rough estimate to the effect that a mechanic in the Respondent's shop might possibly work on about 3 cars a day or maybe 10 cars a week, and further estimated that in the 3-month period of May through July, the period relied upon by the Respondent, Elyar would have worked on between 120 (using the 10 cars a week basis), and 180 cars (using the 3 cars a day basis). The General Counsel points out that assuming Elyar's five or six comebacks were, in fact, comebacks, it is clear his percentage of comeback work is still below that which Stillings finds acceptable.[15]

As to the contention that Elyar was seeking a job elsewhere—Stillings' testimony was that Elyar and Webb were going to walk out, and Colleen Little, the niece of the owner who was employed as a service clerk with Respondent, testified that in early July, Elyar asked if she had heard that Webber and Webb were going to see about a job at Straub's Buick, and stated that on the following day she mentioned this conversation to Stillings, Elyar admitted that 2 or 3 months before his discharge, he had filled out an application with Straub's Buick.

14. The term "comeback" is used to indicate those cars which have been brought back to the dealership by a customer for repair, and it is found that the problem could have been or should have been discovered by the mechanic who originally worked on the car.

15. This record shows that George Draper had 12 comebacks and that Nelson Duncan had 11 comebacks during the same 3-month period without discipline. See General Counsel's Exhibit Nos. 7(a) through (l) and 8(a) through (k).

Richard Webber began working for Respondent as a line mechanic in May, 1975. His starting base salary was $130 per week, and on July 27, the date of discharge, his base salary was $174 per week. Webber also participated in Respondent's bonus program, and his increases in compensation represented four individual raises with the last raise coming about 3 months before his discharge. Stillings again admitted that Webber's wage increases were based upon his productivity and stated that Webber had received more wage increases during his short tenure of employment than any other employee.

One of the reasons assigned to the discharge of Webber was his involvement in several shop accidents. Webber recalled an occasion or two when he had been told not to drive too fast around the shop, that on another occasion he had dropped an exhaust analyzer machine, and admittedly had also damaged a light fixture when the hood of a car struck the fixture. However, all of these incidents took place several months prior to his discharge and he was never suspended, never received any written disciplinary warning, was never verbally warned that his job was in jeopardy, or that his work performance was not satisfactory, and other than a few off-hand remarks by Stillings at the time of the above incident, the record is devoid of evidence that any disciplinary procedure ever resulted from these incidents or, in fact, that the incidents were ever mentioned again in any context until the date of the discharge, months later.

Another reason assigned for the discharge of Webber was a refusal to turn in his certification card. However, as previously discussed, Stillings admitted that he had never demanded submission of the cards prior to the service meeting, and I have previously found that no employee actually refused to submit them, as aforestated.

One other reason assigned for this discharge was carelessness in doing repair jobs, and for proof of same the Respondent introduced various documents or "report cards" received back from customers.[16] One exhibit (No. 3) is dated in September and therefore, could not have been received by Respondent until several weeks after Webber's discharge. Another exhibit is undated (No. 6), one shows that several mechanics worked on a car including Webber but impossible to determine which mechanic was being criticized (No. 7), and Stillings admitted that he could not have relied on one of the other documents (No. 9(g)) as it was also dated after the discharge. As pointed out, the only untainted documentary evidence in this sequence appears to be Exhibit No. 8, which purports to show that in March, 1976, the Company received a comeback on a job Webber performed. However, there is no testimony that Webber was ever questioned about this job in the intervening 4½ months between the complaint and the discharge.

As to Webber complaining about his salary after receiving more raises than any other mechanic, it is disputed that Webber enunciated his views at the service meeting to the effect that mechanics who passed the certification tests should be compensated in some way for their achievement.

It is undisputed that Elyar, Webb, and Webber were the three leading Union adherents in the shop and were the employees responsible for contacting Local 355, and otherwise promoting the organizational effort which culminated in the filing of a representation petition by the Union the day after their terminations. While Respondent contends that it had no knowledge of the Union drive, or the involvement of the discriminatees in such a drive prior to the filing of the petition, reason dictates that this was

16. See Respondent's Exhibit Nos. 3 through 9(g).

not the case. As further indicated, in the week preceding the terminations, Elyar and Webb promoted attendance at the Union meeting and spoke with many of Respondent's employees in and around the shop. Following the Union meeting all three of them spoke with employees who had not attended the meeting, encouraged them to support the Union, showed certain employees copies of union contracts at other shops, and also solicited union authorization cards. Again, this activity was centered in and around the shop.

The General Counsel further points out that in a small facility such as Respondent's, where the entire unit consists of approximately 25 employees, a reasonable inference may be drawn that Respondent would be aware of a union attempt to organize its employees, and that this would be particularly true where the discriminatees advertised the Union to other employees and who, in the case of employee Smith, would admittedly inform Stillings of union activities, as aforestated. Moreover, the close timing between the initiation of the protected activity and the discharges, also serves to strengthen the inference of knowledge. It is also noted that Stillings was familiar with past union organizational drives from prior experiences with Respondent, knew that there had been such a drive a year or two earlier, and then on July 26 went so far as to interrogate employee Crombine about possibly union activity, 1 day before the discharges. There can be no serious question but that Stillings had knowledge of the discriminatees' union activities prior to their terminations, and I so find.

In the instant case, if this complaint was to be dismissed, I would have to believe and conclude that as a coincidence the three leading advocates and organizers for the Union, were all discharged on the same day for

varying work-related deficiencies, all within 1 week of the initiation by them of the organizational drive and the day following the first union meeting, and which discharges were also attributable in part because Webb, Elyar and Webber failed to cooperate or respond in the request to submit their certification cards at the service meeting, and even though Stillings had admittedly made no prior request that they do so. Moreover, Stillings contends that he did not make the decision to discharge the three here involved until after the service meeting. Why, then, as suggested by the General Counsel, did Stillings have termination checks prepared before the service meeting and only for the three discriminatees? And why did he decide to discharge only three while others may also have passed the tests. I am in agreement with the General Counsel that the answer to these questions lies in the realization that the certification card issue was a pretext for the real reason for discharge—the desire of Respondent to quash the incipient Union drive by eliminating its chief protagonists—and such motive becomes even more apparent upon examination of the alleged work deficiencies of each discriminatee.

As indicated, Webb was supposedly discharged because of his limited skills—being able to perform only brake and front-end work. Yet, the record evidence shows that Webb was hired as a brake and front-end mechanic, performed this work on an almost exclusive basis because this was usually the only type of work Respondent assigned him, and performed his work in a fashion which enabled him to receive regular wage increases which Stillings admits were based upon his performance; and such also must be viewed in the context of never having received and type of disciplinary warning, never having been told that his job was in jeopardy, and a record devoid

of any evidence whatsoever that Respondent's brake and front-end work had declined.

Respondent contends that Elyar was discharged because he had a lot of comebacks, and because he boasted about getting another job, as aforestated. However, this record reveals that as of 3 days before his discharge Stillings intended to recommend him for a promotion to line mechanic, and that the comebacks relied upon by Respondent in a 3-month period possibly amounted to a figure below that considered acceptable by Stillings. This, too, must be considered in the context of Elyar's having received no disciplinary warnings, never having been advised that his work performance was other than good, and his having received various wage increases with the last coming shortly prior to his discharge. As to Elyar's alleged "boasting" about getting another job—this record shows that Elyar had filed an application and then mentioned to another employee that he and others were going to see about jobs at Straub's Buick. I suggest that it would be extremely difficult to conclude that such statements and conduct could result in any bona-fide basis for discharge, and especially when viewed in context with the other circumstances. The Respondent contends that Webber was discharged because of his carelessness in causing shop accidents. However, as has been noted, the only reliable documentary evidence introduced by Respondent showing Webber's carelessness, relates to an accident which occurred months prior to the discharge. Moreover, Webber was never disciplined in any way and was never warned that his job was in jeopardy, but to the contrary, Webber regularly received weekly production bonuses and, in his 14 months of employment, received four wage increases which were based upon his work performance and which, Respondent concedes, represented the most wage increases granted to any employee during such a period.

I have found that Webb, Webber, and Elyar were discharged because they joined or assisted Local 355, sought to bargain collectively through representatives of their own choosing, and/or engaged in other concerted activities for the purpose of collective bargaining or mutual aid or protection.

On July 26, Crombine, at the request of the discriminatees, spoke to Stillings about possible compensation as to the certificates, and in the context of that conversation Stillings admits to asking: "Was there anything else bugging these guys; is there any Union stuff going on?" Crombine then recalls advising Stillings that "there are talks of a union." The questioning by Stillings under these circumstances constitutes unlawful interrogation in violation of Section 8(a)(1) of the Act.

The Union challenged the ballot of Gordon Scala (22-RC-6840) on the ground that he is a supervisor within the meaning of the Act. The Respondent contends that Scala *is* a working foreman who does not possess any of the *indicia* of supervisory status.

Since May, 1976, Scala has been working in the New and Used Car Section of the Service Department. This section is under the overall direction of Service Manager Stillings. In addition, decisions concerning how extensively individual cars should be repaired are made by the general sales manager. Thus, there are two levels of supervision over the New and Used Car Department.

Scala testified that after he received an internal repair order made up by the sales manager or the general manager, the repair order would then be logged on a sheet, and after so doing the cardboard copy of the repair order would be put in a rack where the mechanics might either be handed the repair order, or they could take it out the

rack themselves. It also appears that the sales department establishes the priority for a particular job, and the day of delivery will usually be specified on the repair order. George Draper, a former employee, testified that if Scala was not at or near his desk a mechanic could simply take a job from the top of the rack. Moreover, Scala testified that the distribution of internal repair orders to the mechanics was often based on the generally known perference of the mechanics. In response to a question whether the distribution of jobs involves judgments, Scala stated: "Well, I don't make the judgment. It's just common knowledge among all of us. I know what I can do. He knows what I can do. I know what he can do. It's general knowledge. We work together." As pointed out, this record demonstrates that the routing of internal repair orders is nothing more than a routine function that goes over Scala's desk. Other employees can and do pick up orders from the rack at Scala's desk and, in turn, select the highest priority job or a job that suits their abilities, and the selection process works in an orderly manner even when the mechanics choose their own jobs. In fact, Scala is frequently away from his desk performing other work.

As further indicated, Scala testified that only Manager Stillings is responsible for hiring employees, and also credibly testified that he does not interview employees in connection with hiring, has never recommended an employee for hire, nor can he transfer any person, recommend transfers, suspend employees, lay employees off, recall laid off employees, recommend promotions, nor can he recommend discharges. Scala stated that he never recommended anyone for a raise in the New and Used Car Department, and that he does not attend supervisory meetings. And, in conflict to the testimony of Nelson Duncan, denied given any direct recommendation relative to a pay raise for Duncan. Duncan had testified that Scala told him he had gotten him a raise, but Scala testified that he merely passed the request for a raise from Duncan to the service manager, and said that some time later Tom Lyttle had asked him a question concerning whether anybody needed a raise. Only at that point, when the subject was brought up by the owner, did Scala again mention Duncan's request.

Daniel Robertson testified that Scala was called in to ask him some questions before he was hired, but Scala denied that he had ever interviewed anybody for a job. Stillings testified that he had called Robertson back in order to hire him after having checked his references, and at this time Scala happened to be in the area and that he then introduced Scala to the newly hired employee. Thus, while admittedly some conversation took place, it has nothing to do with the hiring process.

Several witnesses in this proceeding testified that Scala was referred to as "Manager," but, of course, the real issue concerns Scala's duties, and not what other employees might have called him. While Scala does not punch a timeclock, it appears that this past arrangement or practice was continued over into his new position. It is also true that Scala earns more than his co-workers, but this record shows that he has greater skills and more seniority than the other men, and his service commission was a carry over from his former position of a service writer. As further pointed out, Scala does not maintain his own set of tools, but he does use those of his co-workers for a particular job, and since he seldom does protracted mechanical work on any individual car, there is no need for him to have his own set of tools.

I find that any recommendations or directions issued by Scala with respect to other employees, were routine in

nature and did not require the exercise of independent judgment, and further that his powers of directions were limited and as a result Scala was no more than a working foreman who merely transmitted work orders and advice to other employees. Moreover, even assuming, *arguendo*, that one or two specific instances of supervisory authority has been shown, it is, nevertheless, well established that supervisory authority of a sporadic and irregular nature is insufficient to qualify an employee as a supervisor.

The Remedy

Having found, as set forth above, that the Respondent has engaged in certain unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action set forth below designed to effectuate the policies of the Act.

It having been found that the Respondent discriminatorily discharged Steven Elyar, Victor Webb, and Richard Webber, I shall recommend that the Respondent offer them immediate and full reinstatement to their former or substantially equivalent position, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them by payment to them of a sum of money equal to that which they would normally have earned from the date of their discharges, less net earnings, during said period. All backpay provided herein shall be computed, with interest on a quarterly basis, in the manner described by the Board in *F.W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed by Section 7 of the Act, as detailed herein, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By unlawfully discharging Steven Elyar, Victor Webb, and Richard Webber, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact and conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issued the following recommended: [17]

ORDER

Tom's Ford Incorporated, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees concerning their knowledge of the Union and its organizational activities.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

17. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act.

(a) Offer to the three employees named herein immediate and full reinstatement to their former positions or, if such positions are no longer available, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging if necessary any employees hired to replace them, and make them whole for any loss of earnings they may have suffered as a result of the unlawful action taken against them in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying *all* payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Post at its place of business, copies of the attached notice marked "Appendix."[18] Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said

18. The ballots of Elyar, Webb, and Webber were challenged by a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 22, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.

The Representation Case 22-RC-6840, was consolidated concerning the issue raised by the challenge to the ballot of Gordon Scala, and my findings of fact and conclusions are set forth above. In view thereof, the challenge is hereby overruled and the ballot of Gordon Scala should be opened and counted, and a revised tally be issued.[19]

Dated, Washington, D.C. June 20, 1977.

/s/ Phil W. Saunders
PHIL W. SAUNDERS
Administrative Judge

19. The ballots of Elyar, Webb, and Webber were challenged by a Board agent because their names did not appear on the list of eligible voters submitted by the Company. However, since I have found that all three were discriminatorily discharged prior to the election, they too were eligible voters as their reinstatement dates from July 27, 1976. Recommendations made herein on all issues raised by the consolidated cases, shall be submitted directly to the Board.

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES
GOVERNMENT

AFTER A TRIAL IN WHICH ALL SIDES HAD THE OPPORTUNITY TO GIVE EVIDENCE, AN ADMINISTRATIVE LAW JUDGE OF THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE VIOLATED THE NATIONAL LABOR RELATIONS ACT, AND HAS ORDERED US TO POST THIS NOTICE.

The Act gives all employees these rights:

To engage in self-organization;

To form, join or help a union;

To bargain collectively through a representative of your own choosing;

To act together for collective bargaining or other mutual aid or protection;

To refrain from any or all of these things.

WE WILL NOT do anything that restrains or coerces you with respect to these rights. More specifically:

WE WILL NOT layoff, discharge, or in any other manner discriminate against employees for joining or supporting AMALGAMATED LOCAL UNION NO. 355, or any other labor organization.

WE WILL NOT interrogate employees concerning their knowledge of the Union and its organizational activities.

WE WILL offer full reinstatement to Steven Elyar, Victor Webb, and Richard Webber and give them backpay, plus 6 percent interest, as set forth in the Decision of the Administrative Law Judge.

TOM'S FORD INCORPORATED

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

_____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, 16th Floor, 970 Broad Street, Newark, N.J. 07102 (Tel. No. 201-645-3652).

APPENDIX C

OPINION OF THE COURT
(Filed August 18, 1978)

PER CURIAM.

The National Labor Relations Board found that respondent Tom's Ford, Incorporated violated § 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), by coercively interrogating one of its employees, and § 8(a)(1) and (3), 29 U.S.C. § 158(a)(1) and (3), by discharging three employees who had actively participated in union organizing efforts. The charges arose out of a campaign by Amalgamated Local Union No. 355 to represent respondent's service employees. That drive was triggered by three employees, Victor Webb, Richard Weber, and Steven Elyar, who telephoned the union business agent on July 19, 1976 to inquire about representation of the company's employees.

At a meeting on the evening of July 26, 1976, attended by approximately 14 of the 26 service employees, the business agent discussed the benefits of union membership. Webb identified Weber, Elyar and himself as the employees who had contacted the union. All the employees present signed authorization cards, and on the following day, Elyar distributed authorization cards in the shop to those who had not attended the organization meeting. That evening, at the conclusion of a regular monthly service meeting, the service manager discharged Webb, Weber and Elyar.

Finding that the discharge was the result of their organizational activity on behalf of the union, the Board directed that the three employees be reinstated and awarded back pay. There is substantial evidence in the

record to support the Board's decision and order in this respect, and we will grant enforcement.

We do not find, however, that the charge of coercive interrogation is supported by the record. The Board's decision was based upon one conversation on July 26, 1976 between an employee named John Krumbine and the employer's service manager. Krumbine told the service manager that mechanics who had recently passed various proficiency tests wished to receive extra compensation. After stating that it was not up to him, the service manager asked if "there was any union." Krumbine replied: "There are talks of a union." That was the extent of the discussion which, in the view of the ALJ and the Board, substantiated the charge of a violation of §8(a)(1).[1] We do not agree.

The test for coercion is whether under the circumstances the misconduct may reasonably tend to coerce or intimidate employees. *Local 542, International Union of Operating Engineers v. NLRB*, 328 F.2d 850 (3d Cir.), *cert. denied*, 379 U.S. 826 (1964). The circumstances here were that one employee initially sought out the service manager, a person of limited authority, who asked only one question, and it did not carry any connotation of threats or reprisals. It cannot be said that this single isolated incident could reasonably be said to be coercive. Accordingly, we will deny enforcement of that part of the Board's order referring to coercive interrogation of employees.

The respondent alleges that the ALJ improperly refused to sequester certain witnesses in accordance with the provisions of Fed. R. Evid. 615.[2] In so ruling, the ALJ relied

1. Section 8(a)(1), 29 U.S.C. § 158(a) reads:
"It shall be an unfair labor practice for an employer—
(1) to interfere with, restrain, or coerce employees in exercise of the rights guaranteed in section 157 of this title."

2. Section 10(b) of the Act, 29 U.S.C. § 160(b) (1970) provides that "so far as practicable" unfair labor practice proceedings shall "be conducted in accordance with the rules of evidence applicable in the district courts."

upon the Board's reasoning that, under its procedures, discriminatees having a concrete stake in the outcome of the case are for all practical purposes claimants—not merely witnesses—and may remain in the hearing room. *See, e.g., Unga Painting Corp.*, 229 N.L.R.B. 567 (1977); *Jacques Power Saw Co.*, 85 N.L.R.B. 440, 443 (1949). The Court of Appeals for the Second Circuit took a contrary position in *NLRB v. Stark*, 525 F.2d 422 (2d Cir. 1975), *cert. denied*, 424 U.S. 967 (1976), but found a remand unnecessary because other evidence in the record supported the decision.

We are satisfied that the refusal to exclude the discriminatees Webb, Weber and Elyar from the hearing did not prejudice the respondent. There is no indication that the ALJ relied upon their testimony to resolve material issues of fact in the proceeding. Accordingly, we need not reach the question of whether the refusal to order sequestration was error under the circumstances. *See NLRB v. National Fixtures, Inc.*, 574 F.2d 1305 (5th Cir. 1978); *NLRB v. Pope Maintenance Corp.*, 573 F.2d 898 (5th Cir. 1978); *NLRB v. Hale Manufacturing Co.*, 570 F.2d 705 (8th Cir. 1978); *L.S. Ayres & Co. v. NLRB*, 551 F.2d 586 (4th Cir. 1977).

The order of the Board directing reinstatement of and awarding back pay to Victor Webb, Richard Weber, and Steven Elyar will be enforced. Enforcement will be denied as to that portion of the Board's order providing a remedy for alleged violation of § 8(a)(1) based upon coercive questioning of employees.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

APPENDIX D

JUDGMENT
(Filed September 8, 1978)

Before: ADAMS, WEIS and HIGGINBOTHAM,
Circuit Judges.

THIS CAUSE came on to be heard upon a petition filed by Tom's Ford, Incorporated, to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and asigns on October 18, 1977, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on July 24, 1978, and has considered the briefs and transcript of record filed in this cause. On August 18, 1978, the Court being fully advised of the premises, handed down its opinion granting in part and denying in part enforcement of the Board's said order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that the Petitioner, Tom's Ford, Incorporated, Keyport, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from laying off, discharging, or discriminating against employees for joining or supporting Amalgamated Local Union No. 355, or any other labor organization.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act.

(a) Offer to Steven Elyar, Victor Webb and Richard Weber immediate and full reinstatment to their former positions or, if such positions are no longer available, to substantially equivalent positions, without prejudice to

their seniority or other rights and privileges, discharging if necessary any employees hired to replace them, and make them whole for any loss of earnings they may have suffered as a result of the unlawful action taken against them in the manner set forth in the section of the Administrative Law Judge's Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying *all* payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Judgment.

(c) Post at its place of business, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 22, of the National Labor Relations Board (Newark, New Jersey) after being duly signed by Petitioner's representative, shall be posted by Petitioner immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Petitioner to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the aforesaid Regional Director, in writing, within 20 days from the receipt of this Judgment, what steps have been taken to comply herewith.

It is further ORDERED that each party shall bear its own costs.

BY THE COURT,

_____
Circuit Judge

DATED: October 5, 1978

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER, AS MODIFIED, OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Act, as amended, gives all employees these rights:

To engage in self-organization

To form, join, or help a union

To bargain collectively through a representative of your own choosing

To act together for collective bargaining or other mutual aid or protection

To refrain from any or all of these things.

WE WILL NOT lay off, discharge, or discriminate against employees for joining or supporting Amalgamated Local Union No. 355, or any other labor organization.

WE WILL offer full reinstatement to Steven Elyar, Victor Webb, and Richard Webber and give them backpay with interest for their loss of earnings and restore their seniority and the privileges attaching to it.

TOM'S FORD, INCORPORATED

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, 16th Floor, 970 Broad Street, Newark, New Jersey 07102, Telephone (201)645-3652.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-2398

TOM'S FORD, INC.,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until November 25, 1978.

By: /s/ Joseph P. Weis, Jr.
JOSEPH P. WEIS, JR.
Circuit Judge

Dated: November 1, 1978